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No. 80-816

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF LOUISIANA,
Respondent,

versus

RICHARD JAMES BOURQUE,
Petitioner.

On Petition for Writ of Certiorari to
The Supreme Court of Louisiana

PETITION FOR CERTIORARI

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November ____, 1980

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QUESTIONS PRESENTED

Whether the prosecution of petitioner, age 18, under Louisiana's Carnal Knowledge Statute (LSA R.S 14:80) for engaging in sexual intercourse with a minor female violates petitioner's rights to equal protection of the law as guaranteed under Paragraph 1 of the Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the Louisiana Constitution of 1974 where the female can commit no crime under the Statute.

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No.

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SUPREME COURT OF THE UNITED STATES
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PETITION FOR CERTIORARI

Petitioner, RICHARD JAMES BOURQUE, respectfully prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Louisiana, which was entered in this proceeding on October 6, 1980.

OPINION BELOW

No opinion of the Supreme Court of Louisiana was given in this case since it was a denial on an application for supervisory writs.

JURISDICTION

The decision of the Supreme Court of Louisiana was entered on October 6, 1980. This Court has jurisdiction under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Louisiana Revised Civil Code 14:80:

Carnal knowledge of a juvenile is committed when:

(1) A male over the age of seventeen has sexual intercourse with consent, with any unmarried female of the age of twelve years or more, but under the age of seventeen years, when there is an age difference of greater than two years between the two persons; or

(2) A person over the age of seventeen has anal or oral sexual intercourse, with consent, with a person of the age of twelve years or more, but under the age of seventeen years, when there is an age difference of greater than two years between the two persons.

Lack of knowledge of the juvenile's age shall not be a defense. Emission is not necessary; and penetration, however slight, is sufficient to complete the crime.

Whoever commits the crime of carnal knowledge of a juvenile shall be imprisoned, with or without hard labor, for not more than ten years.

Amended by Acts 1977, No. 539, Section 1; Acts 1978, No. 757, Section 1.

Section 1 of the Fourteenth Amendment of the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

One count Bill of Information was filed in the Fifteenth Judicial District Court, Parish of Acadia, State of Louisiana, on April 25, 1980. The Bill of Information alleged that the defendant "did commit carnal knowledge of Penelope Miller, a juvenile, in violation of the provisions of R.S. 14:80". A Motion to Quash was filed on the grounds the statute was unconstitutional and that it violated equal protection clauses of both the United States and Louisiana Constitutions. This Motion was denied on July 21, 1980.

On August 4, 1980, a petition for supervisory writs was filed in the Louisiana Supreme Court requesting a dismissal of the Bill of Information.

On October 6, 1980, the Supreme Court of Louisiana denied the Supervisory Writ.

REASONS FOR GRANTING THE WRIT

Introduction

The petitioner, RICHARD JAMES BOURQUE, stands before this Court accused of participating in sexual intercourse with Penelope Miller, a 15 year old female. RICHARD BOURQUE was 18 years old at the time of the alleged offense, more than two (2) years older than Penelope Miller. Under the statute challenged, Penelope Miller has committed no crime, while RICHARD BOURQUE faces the prospect of a felony prison sentence. If the roles had been changed, if Penelope Miller had been 18 years of age at the time and RICHARD BOURQUE had been 15 years, Penelope Miller would have committed no crime. RICHARD BOURQUE has questioned this disparate treatment of males and females on equal protection grounds.

Louisiana Supreme Court had previously considered the constitutionality of this statute and acknowledged that the statute classifies and discriminates on the basis of sex. The Court justified the discriminatory classification scheme of the statute on the grounds that there was a "compelling concern for the welfare of the State's young female citizens sufficient to justify the general classification continue in LSA - R.S. 14:80." These "compelling interests" seem to be centered

around the prevention of pregnancy and preventing the possibility of harm to the young female genitalia and lingering mental damage and neurosis. *State v. Bell*, 377 So.2d 303 (Appendix, pg. 4a), no other justification has been offered.

It is obvious that the statute discriminates against males. Males face prison sentences for conduct which females engage in with impunity. On closer examination, it is equally apparent that the statutory classification scheme is based upon the outdated stereotype of male supremacy. The statute challenged is therefore inherently and impermissibly discriminatory to both sexes.

The opinion in *State v. Bell* of the Louisiana Supreme Court is replete with provincial assumptions and inherent sexual prejudices. The majority opinion finds that males are more culpable than females for engaging in non-marital sex. The Court further concludes that contraceptives are of doubtful value in preventing pregnancy. The opinion attempts to confirm inveterate sexual conventions at a time when the courts should be acting to eradicate arrant sexual stereotypes. See *Orr v. Orr*, 440 U.S. 268, 59 L.Ed.2d 306, 99 S.Ct. 1102. *Craig v. Boren*, 429 U.S. 190, 50 L.Ed.2d 397, 97 S.Ct. 451. *Frontiero v. Richardson*, 411 U.S. 677, 684-685, 36 L.Ed.2d 583, 590, 93 S.Ct. 1764. *Reed v. Reed*, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251. This Court should therefore consider the questions presented by

this case and dispel the erroneous stereotypes held by the Supreme Court of Louisiana.

I.

The Opinion Below Justifies And Promotes Unequal Treatment Of The Sexes Under The Law And Is In Direct Conflict With The Decisions Of This Court On Sex Discrimination

Louisiana's Carnal Knowledge Statute creates an arbitrary irrebutable presumption of male culpability. The statute blames the male even though the female may be the sexual aggressor. The consequences of application of the statute are completely inequitable and by exclusively holding males criminally liable for consensual teenage sex, the statute creates an arbitrary burden on the rights of males. The arbitrary use of sex as a criteria, however, is not constitutionally permissible. *Reed v. Reed*, supra.

The Court obviously ignores the fact that males are not the only persons to cause pregnancy. The joint action of both a male and a female is required. The Court's distortion of this physiological fact is a futile attempt to cling to the stereotypes embodied in the statutes. The Court's position in Bell is not grounded in medical or legal fact and should not stand as a statement of constitutional law.

The fallacious reasoning of the Court is aptly pointed out by Justice Mosk in his dissent filed in the case of *Michael M. v. Superior Court of Sonoma County*, 25 Cal. 3d, 608 at page 624 wherein he states:

> "Because she is a woman she is deemed inherently less capable of knowing the facts, of controlling her emotions, of weighing the risks and benefits, and of making intelligent choices — in short, she is less responsible for her actions — than her male counterpart. As it presently reads, the California statutory rape law reflects a belief that the minor female is in need of special protection not only against the male but also against herself, against her 'voluntary' but presumptively imprudent decisions in matters of sex."

The Court's use of pregnancy prevention to justify the discriminatory operation of the statute perpetuates fixed notions about the sexes. The fact that only females become pregnant has been traditionally used as a rationalization for sex discrimination. "Certainly the fact that women and not men bear children is a fundamental distinguishing characteristic of the two sexes and as such can be the basis for some gender based legislation; but there is a danger that the very uniqueness of this characteristic makes it an available hindsight catchall rationalization for laws promulgated with totally different purposes in mind". *Meloon v. Helgemoe*, (1st Cir., 1977) 564 F.2d 602, 607, cert. denied, 436 U.S. 950, 56 L.Ed.2d 793, 98 S.Ct. 2858.

II.

The Constitutional Validity Of Statutory Rape Laws Is A Question Of National Importance Which Should Be Decided By The Court

This Court is presently considering the case of *Michael M. v. Superior Court of Sonoma County*, filed March 1, 1980, No. 79-1344, United States Supreme Court. Although the statute in question is very similar to the Louisiana Revised Statute, there are some differences and in order to resolve all the issues this Court should grant the writ applied for in order to focus on a specific statute as written in the State of Louisiana.

CONCLUSION

The decision of the Louisiana Supreme Court is based on the antiquated sexual myth of the superiority of the male. Such an opinion by the highest Court of the state of Louisiana can only help to perpetuate the notion that women are inferior to men, and prolong the struggle for equal rights among the sexes. Questions as to the validity of many forms of statutory rape laws have been raised in numerous courts throughout the nation. This Court should grant certiorari to give constitutional guidance on the issues presented herein.

For the foregoing reasons, a writ of certiorari should issue to review the Judgment of the Supreme Court of Louisiana.

Dated: November ____, 1980.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that three true and correct copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Louisiana, have been mailed, postage prepaid, addressed as follows:

Jack Derrick Miller
Assistant District Attorney
Fifteenth Judicial District Court
Acadia Parish Courthouse
Crowley, LA 70526

I further certify that all parties required to be served have been served.

_____

NOLAN J. EDWARDS

APPENDIX

15TH JUDICIAL DISTRICT COURT
PARISH OF ACADIA, LOUISIANA

STATE OF LOUISIANA

VERSUS

RICHARD JAMES BOURQUE

CRIMINAL DOCKET NO. 33,557

MINUTE ENTRY

The defendant, Richard James Bourque appears before this Court on his motion to quash a bill of information charging him with the act of carnal knowledge of a juvenile in violation of L.R.S. 14:80. The substance of defendant's argument is that the criminal statute in question discriminates on the basis of sex in that only males may be charged under part one of the statute, and therefore, this law is violative of defendant's right to equal protection of the law as provided in the Fourteenth Amendment of the Constitution of the United States and Article Three of the Louisiana Constitution of 1974.

It is the obligation of the Court to follow the decisions of the Supreme Court of this State; the ruling in

State v. Bell, 377 So.2d 303 (1979) is considered by this Court to be binding authority on the issue of the constitutionality of L.R.S. 14:80. A statute may create classes which result in their different treatment when it furthers a compelling state interest and is drawn in the least restrictive manner possible:

> "We share the view that protection of young females from pregnancy, from possible injury to their reproductive systems as well as the possibility of lingering mental impairment, is a legitimate area of state concern justifying the sex classification involved in subject statute."

Accordingly, defendant's motion to quash the bill of information is denied. All costs of these proceedings shall be borne by defendant.

Lafayette, Louisiana this 21st day of July, 1980.

/s/ ALLEN M. BABINEAUX
DISTRICT JUDGE

Filed: July 24, 1980

/s/ MARK MYERS, JR.
DEPUTY CLERK OF COURT
ACADIA PARISH, LA.

THE SUPREME COURT OF THE
STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS No. 80-K-1764

RICHARD JAMES BOURQUE

In Re: Richard James Bourque, applying for supervisory writs, Parish of Acadia, Number 33,557.

October 6, 1980

Denied.

PFC

JAD

WFM

FAB

JCW

HTL

Supreme Court of Louisiana
October 6, 1980

/s/ FRANS J. LaBRANCHE, JR.
Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

STATE of Louisiana

versus

Jeffrey Wayne BELL

STATE of Louisiana

versus

Felton ROBERTS

Nos. 64574, 65227

November 12, 1979

LANDRY, Justice Ad Hoc.

These consolidated cases involve constitutional attack on L.S.A.-R.S. 14:80, commonly known as the Louisiana carnal knowledge of a juvenile law, on ground that the statute sanctions sex discrimination proscribed by La. Const. 1974, Article 1, Section 3, and also violates the equal protection clauses of La. Const. 1974, Article 1, Section 3, and the fourteenth amendment to the United States Constitution.

In *Bell*, defendant's motion to quash a bill of information charging violation of subject statute, was denied in

the trial court finding that the statute meets the constitutional challenge. We granted certiorari to review this determination. In *Roberts*, defendant's motion to quash a bill of information charging violation of subject statute was sustained and the State has appealed. Because the cases produced opposite holdings on the same issue, they have been consolidated for disposition by this court.

L.S.A.-R.S. 14:80, as amended by Acts 539 of 1977 and 757 of 1978, now provides:

> "§80. Carnal knowledge of a juvenile
> Carnal knowledge of a juvenile is committed when:
>
> (1) A male over the age of seventeen has sexual intercourse, with consent, with any unmarried female of the age of twelve years or more, but under the age of seventeen years, when there is an age difference of greater than two years between the two persons; or
>
> (2) A person over the age of seventeen has anal or oral sexual intercourse, with consent, with a person of the age of twelve years or more, but under the age of seventeen years, when there is an age difference of greater than two years between the two persons.
>
> Lack of knowledge of the juvenile's age shall not be a defense. Emission is not necessary;

and penetration, however slight, is sufficient to complete the crime. Whoever commits the crime of carnal knowledge of a juvenile shall be imprisoned, with or without hard labor, for not more than ten years."

Prior to the aforesaid recent amendments, subject statute pertinently stated:

"§80. Carnal knowledge of a juvenile
Carnal knowledge of a juvenile is committed when anyone over the age of seventeen has sexual intercourse, with her consent, with any unmarried female person of the age of twelve years or over, but under the age of seventeen years. Lack of knowledge of the female's age shall not be a defense. Emission is not necessary; any sexual penetration, however slight, is sufficient to complete the crime.

Whoever commits the crime of carnal knowledge of a juvenile shall be imprisoned, with or without hard labor, for not more than five years."

Defendant Bell maintains that the trial court erred in failing to find that the statute arbitrarily, capriciously and unreasonably discriminates against males because it provides that only males can be offenders and only females can be victims of the conduct proscribed therein. The State contends the sex discrimination involved

meets the constitutional test of legitimate class differentiation.

La. Const. 1974, Article 1, Section 3, states:

> "§3. Right to Individual Dignity
> Section 3. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime."

It readily appears that Article 1, Section 3, above, proscribes both discrimination on account of sex and denial of equal protection of the laws to the citizens of this state. The fourteenth amendment to the United States Constitution guarantees all the fundamental right of equal protection of the laws.

Notwithstanding the equal protection clauses of the Federal and state constitutions, a statute may create classes for which different treatment is prescribed, provided equal protection requisites are satisfied. *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976).

In dealing with equal protection challenges to constitutionality, the Supreme Court of the United States has traditionally employed the rule of strict scrutiny in the so called "suspect classes" such as race, franchise and violation or infringement of fundamental constitutional rights. In such instances, the rule is that to survive strict scrutiny, the statute must further a compelling state interest and be drawn in the least restrictive manner possible. *Brown v. Board of Education of Topeka,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

On the other hand, "mere rationality" is the test applied in cases involving classes not embraced within the "suspect" categories. In these instances, equal protection requirements are deemed fulfilled if a rational basis is found for opting a particular means of achieving or promoting a legitimate state end, such as economic regulation. *City of New Orleans v. Dukes,* above.

In dealing with classification predicated on gender, although such classification was not found to be inherently suspect, the United States Supreme Court has decreed that the statute must meet a higher standard than rationality of economic regulation. We refer to *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) which involved an Oklahoma statute prohibiting sale of non-intoxicating 3.2 beer to males below age 21, but which also allowed the sale of the same beverage to females 18 years of age or older. Although the statute was stricken because an insufficient showing was made to support a class distinction for regulating

drinking, the court found, nevertheless, that such statutes may withstand the equal protection examination if the gender classification serves important governmental objectives and is substantially related to achievement of those ends. See also *Califano v. Webster*, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977); *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979).

Similar attacks on carnal knowledge of juvenile statutes and statutory rape statutes of other jurisdictions have resulted in only one instance in which laws have been held invalid for sex discrimination, namely, *Meloon v. Helgemoe*, 436 F.Supp. 528 (D.C.), affirmed 564 F.2d 602, 1st Cir. 1977, cert. den. 436 U.S. 950, 98 S.Ct. 2858, 56 L.Ed.2d 793 (1978), which involved New Hampshire's statutory rape law.

Numerous other jurisdictions, however, have rejected the *Meloon* rule, which, inter alia, rejected the principle that the state's interest in preventing pregnancy among young females was not a valid state objective. In *State v. Brothers*, Del. Super., 384 A.2d 402 (1978) the court expressly declined to follow *Meloon's* rejection of the concept that prevention of pregnancy in young females was not a legitimate state interest.

State v. Thompson, 162 N.J.Super. 302, 392 A.2d 678 (1978) sustained the validity of a New Jersey statute providing that only males could commit the offense of

carnal knowledge of a juvenile, even though the statute did not require penetration as an essential element of the offense.

In *State v. Rundlett*, Me., 391 A.2d 815 (1978), Maine's Supreme Court found that Maine's gender based statutory rape law served an important governmental objective, was substantially related to the objective sought to be attained and was therefore, valid.

The rationale of *Brothers, Thompson* and *Rundlett*, is that the state has a valid interest and objective in deterring male intercourse with young females because of the inherent danger of pregnancy to the female, which danger does not exist in those instances where the male is victim of a similar offense. The decisions also recognize and point to the greater possibility of harm to the young female resulting from penetration of the vagina by the male sex organ. We add that common judgment recognizes the possibility of lingering mental damage and neurosis is far more likely to occur in the case of a female victim than in that of a male victim.

We find the reasoning of those jurisdictions which have upheld the validity of similar statutes, to be sound. We share the view that protection of young females from pregnancy, from possible injury to their reproductive systems as well as the possibility of lingering mental impairment, is a legitimate area of state concern, justifying the sex classification involved in subject statute.

In recent decisions we have considered gender-classed sex offense statutes and upheld their validity against the charge of discrimination and denial of equal protection of the law constitutional guarantees. In *State v. Hollins*, 375 So.2d 922, (La. 1979) we upheld La. R.S. 14:86 which dealt with the offense of enticing minors into prostitution. In *State v. Fletcher*, 341 So.2d 340 (La. 1976), the Louisiana aggravated rape statute was held to be non-discriminatory against males even though females could not be prosecuted for rape. In *State v. Devall*, 302 So.2d 909 (La. 1974), we sustained validity of a statute providing that only females could be prosecuted for prostitution.

Appellant Bell points to recent revisions in L.S.A.-R.S. 14:86 as amended by Act 434 of 1978, which now provides that females may be guilty of enticing minors into prostitution. Said appellant also notes revision of L.S.A.-R.S. 14:42, which currently provides that females may be guilty of aggravated rape, as amended by Act 239 of 1979. Finally, said appellant notes L.S.A.-R.S. 14:82, as amended by Act 49 of 1977, pursuant to which males may be prosecuted for prostitution. It is Bell's contention that these recent statutory amendments indicate legislative intent to terminate all sex differentiation and discrimination in sex offense statutes.

We find no merit in the foregoing contention. We note that L.S.A.-R.S. 14:80(1) as recently amended, makes it an offense only for a male to have intercourse with a female within the designated juvenile bracket. It

is significant that L.S.A.-R.S. 14:80(2), now makes it an offense for a female as well as a male to have anal or oral intercourse with a male or female victim within the designated age bracket. It appears obvious that the legislature has carefully considered the difference between natural intercourse by an adult male with a young female and unnatural (anal or oral) intercourse by an adult male or female with a juvenile male or female victim. It is evident that the unnatural intercourse proscribed in paragraph (2), above, does not involve the danger of pregnancy of the female victim or danger of harm to the reproductive organs of either the male or female victim. In amending 14:80, above, the legislature had the benefit of our prior decisions in the area. Had the legislature intended to abolish the gender based classification of L.S.A.-R.S. 14:80(1) it could have easily done so at the same time it eliminated such classification from paragraph (2). We can conclude only that the legislature found an underlying compelling concern for the welfare of the state's young female citizens sufficient to justify the general classification continued in L.S.A.-R.S. 14:80(1).

Defendants make the final argument that equal protection mandates equal treatment. In support of this contention they rely upon *Sumrell v. York*, 288 F.Supp. 955 (Dist. Conn. 1968); *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968); *Commonwealth v. Stauffer*, 214 Pa. Super. 113, 251 A.2d 718 (1969). We find these cases factually inapposite. In *Sumrell*, above and *Daniel*,

above, statutes were declared invalid because they imposed different penalties on males and females for the same offense. In *Stauffer*, above, the statute provided a penalty of confinement in the county jail. The sentencing of a female to penitentiary imprisonment was held to violate equal protection guarantees.

The judgment rendered in *State v. Bell*, Number 64,-574, is affirmed and this matter remanded to the trial court for further proceedings consistent with the views herein expressed.

In *State v. Roberts*, Number 65,227, the judgment of the trial court quashing the bill of information charging defendant with carnal knowledge of a juvenile, is reversed and set aside and this matter remanded to the trial court for further proceedings consistent with the views herein expressed.

CALOGERO, J., concurs, agreeing with the majority that R.S. 14:80 violates neither the Louisiana Constitution's equal protection clause, nor the Fourteenth Amendment to the United States Constitution.

MARCUS, J., concurs and assigns reasons.

MARCUS, Justice (concurring).

I agree with the majority that protection of young females from pregnancy, from possible injury to their reproductive systems, and from the possibility of linger-

ing mental impairment is a legitimate area of state concern justifying the sex classification involved in La. R.S. 14:80. However, I disagree with the statement of the majority that La. Const. art. 1, §3 proscribes discrimination on account of sex to the citizens of this state. Discrimination on account of sex is not so proscribed. The third sentence of section 3 states: "No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, *sex*, culture, physical condition, or political ideas or affiliations." (Emphasis added.) This sentence delineates the limitation on the power of the state to discriminate by law against persons of specified classes, including members of either sex. The limitation imposed does not absolutely preclude the legislature from defining the range of persons affected by legislation according to the various classes listed in the section; rather, it proscribes arbitrary, capricious, or unreasonable definition of those affected according to classes. If the discrimination that results from the legislative classification is found to be within reason, the statute does not violate this constitutional provision. Accordingly, I respectfully concur.

CALOGERO, Justice, concurring.

I agree with the majority that R.S. 14:80 violates neither the Louisiana Constitution's equal protection clause (Article 1, §3) nor the Fourteenth Amendment to the United States Constitution.